BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	CC Docket No. 96-128
Reclassification and Compensation Provisions	)	
Of the Telecommunications Act of 1996	)	
	)	
The Illinois Public Telecommunications Association's,	)	
Petition for a Declaratory Ruling Regarding the Remedies	)	
Available for Violations of the Commission's Payphone	)	
Orders	)	

ILLINOIS COMMERCE COMMISSION COMMENTS IN OPPOSITION TO THE IPTA PETITION FOR DECLARATORY RULING

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I. INTRODUCTION AND SUMMARY

Pursuant to the notice released on August 6, 2004, DA04-2487, and the Commission's rules of practice and procedure, §§ 47 C.F.R. 1.415, 1.419, the Illinois Commerce Commission ("ICC") hereby submits these comments in opposition to the Illinois Public Telecommunications Association ("IPTA") petition for declaratory ruling filed on July 30, 2004 in the above-captioned docket ("IPTA Petition").

The ICC opposes the IPTA Petition on all counts for both procedural and substantive reasons. In particular, the ICC opposes IPTA's request for a specific declaratory ruling "that the ICC decision denying the IPTA members refunds or reparations is inconsistent with the Commission's Payphone Orders and that the ICC should re-evaluate its denial of refunds or reparations to ensure compliance with the

Commission's rulings."[1] The ICC disagrees with IPTA's allegation and herein clarifies that the ICC properly implemented the Commission's orders as well as its obligations under state and federal law.

In fact, the ICC finds no basis for the IPTA request. While the Commission is specifically authorized to render declaratory rulings to "terminate a controversy"[2] or "remove uncertainty. . ."[3] no controversy or uncertainty exists here. In this instance, the federal statute and implementing orders are clear. As explained more fully in these comments, this Commission stated clearly in its *Payphone Clarification Order* that the tariffs that it required ILECs to file in compliance with the new services test were *intra*state tariffs.[4] The Commission noted, "[F]or purposes of meeting all of the requirements necessary to receive payphone compensation, the question of whether a LEC has effective intrastate tariffs in effect is to be considered on a state-by-state basis."[5] Thus it should not be surprising that other states may have a different approach to implementing their own applicable intrastate tariff. This is non-controversial.

Moreover, the equities weigh against the retroactive refunds sought by IPTA for a number of reasons. First, the ICC directed SBC – pursuant to an agreement between

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1 IPTA Petition at 3.

2 *Final Rule*, Omnipoint Communications New York MTA Frequency Block A; Establishment of New Personal Communications Services, 61 Fed. Reg. 45903, FCC Docket Nos. 90-314, 96-340 (August 30, 1996), (*hereinafter*, "Omnipoint" at ¶ 6.

3 Administrative Procedure Act, 5 U.S.C. 554(e) (codified as section 1.2 of the rules of practice and procedure, 47 C.F.R. § 1.2). *See Declaratory Ruling*, Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission, 48 Fed. Reg. 27044, FCC Docket No. 83-180, (June 13, 1983). *See also*, Telerent Leasing Corp., 45 FCC 2d 204, 213, *aff'd sub nom.* North Carolina Utilities Commission v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

4 *See, e.g.,* Payphone Clarification Order, ¶¶1, 2, 6, 8, 9, 10, 11, 12 (references to intrastate nature of tariffs).

IPTA and SBC – to offer network services to IPTA members at rates below those required by law. IPTA members enjoyed service at those rates for nearly two years. The ICC believes that it is therefore inequitable for IPTA to demand retroactive refunds based upon a subsequent Commission order, especially where such refunds would violate Illinois law. Second, there was originally uncertainty in applying the new services test. The ICC believes that a carrier that made a good faith effort to comply with the intrastate tariffing requirements of the Payphone Reclassification Proceeding should not now be liable for five years of refunds, even if the individual BOCs may not have been in full compliance with those requirements.[6] Third, there is no evidence of bad faith surrounding the tariffs SBC filed on May 19, 1997, or those Verizon filed on May 21, 1997. Fourth, to the extent that IPTA members suffer any hardship as the result of alleged overpayments over an extended period, this is largely attributable to IPTA itself, inasmuch as IPTA did not pursue its own petition before the ICC with any particular diligence.[7]

Finally, IPTA did not request that the ICC make a determination on the issue of self-certification. IPTA's failure to raise it effectively precludes its new argument here that "the ICC [*2003 Payphone Order*] failed to enforce … the Commission's requirements, i.e., … that SBC … and Verizon were not eligible for dial around compensation until in actual compliance with the cost-based rate requirement[.]"[8] The ICC did precisely what this Commission directed it to do in the *Order on*

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5 Id., ¶12.

6 *See* Payphone Clarification Order, ¶14.

7 *See* 2003 Payphone Order at 43, n.16 (IPTA filed its direct testimony nearly 6 months late).

8 IPTA Petition at 7.

Reconsideration[9]: implement, and direct ILECs to tariff, cost-based, Section 276-compliant intrastate payphone rates.

Given these concerns, the ICC opposes the IPTA Petition and requests that it be denied. In the alternative, if the Commission should decide to make a declaratory ruling, the ICC requests that the Commission clarify that state law governs the intrastate tariffs at issue here, that the equities prohibit retroactive refunds, and that the issue of self-certification is irrelevant.

II. BACKGROUND

On November 8, 1996, in its *Order on Reconsideration* of its *Payphone Reclassification Order*, this Commission directed as follows:

> We require LECs to file tariffs for the basic payphone services and unbundled functionalities in the intrastate and interstate jurisdictions as discussed below. LECs must file intrastate tariffs for these payphone services and any unbundled features they provide to their own payphone services. The tariffs for these LEC payphone services must be: (1) cost based; (2) consistent with the requirements of Section 276 with regard, for example, to the removal of subsidies from exchange and exchange access services; and (3) nondiscriminatory. States must apply these requirements and the *Computer III* guidelines for tariffing such intrastate services. States unable to review these tariffs may require the LECs operating in their state to file these tariffs with the Commission. In addition, LECs must file with the Commission tariffs for unbundled features consistent with the requirements established in the Report and Order. LECs are not required to file tariffs for the basic payphone line for smart and dumb payphones with the Commission. We will rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276. As required in the *Report and Order*, and affirmed herein, all required tariffs, both intrastate and interstate, must be filed no later than January 15, 1997 and must be effective no later that April 15, 1997. Where LECs have already filed intrastate tariffs for these services, states may, after considering the requirements of this order, the *Report and Order*, and Section 276, conclude: 1) that existing tariffs are consistent with the requirements of the *Report and Order* as revised herein; and 2) that in such case no further filings are required. We delegate authority to the Common Carrier Bureau to determine the least burdensome method for small

[9] Order on Reconsideration, ¶163.

carriers to comply with the requirements for the filing of tariffs with the Commission, such as those suggested by NTCA.[10]

On December 17, 1997, the ICC undertook precisely such an investigation.[11] The ICC directed that the following matters should be investigated:

1. LEC compliance with the pricing provisions of the new services test in the provisioning of pay telephone service;
2. The necessity of declaring the pay telephone services of Verizon, [Illinois Consolidated Telephone Company] and Centel (also referred to as Verizon North and Verizon South ("Verizon") competitive; and
3. The removal of subsidies from exchange and exchange access services.

On November 12, 2003, the Illinois Commerce Commission entered its *2003 Payphone Order*.[12] In the 2003 Payphone Order, the ICC determined, *inter alia*: (1) that the Illinois Bell Telephone Company's[13] rates for payphone services did not satisfy the new services test; (2) that Verizon North Inc. and Verizon South, Inc.[14] should be subject to the new services test; (3) that Verizon's rates for payphone services did not satisfy the new services test; and (4) that refunds or reparations to payphone service providers ("PSPs") in the amounts that SBC's and Verizon's payphone rates exceeded those

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[10] *Order On Reconsideration*, ¶163, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 / Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, FCC Docket Nos. 96-128, 91-35, and 96-439 (November 8, 1996) (hereafter, "Order on Reconsideration").

[11] *Final Order*, Illinois Public Telecommunications Association, an Illinois not for profit corporation: Petition to determine whether Illinois local exchange carriers are in compliance with the Illinois Public Utilities Act and Section 276 of the Communications Act of 1934, ICC Docket No. 97-0225 (Dec. 17, 1997).

[12] *Order*, Illinois Commerce Commission On its Own Motion: Investigation Into Certain Payphone Issues as Directed in Docket 97-0225, ICC Docket No. 98-0195 (November 12, 2003) (hereafter "2003 Payphone Order").

[13] The Illinois Bell Telephone Company is hereafter referred to as SBC.

[14] Verizon North, Inc. and Verizon South, Inc. are hereafter referred to, collectively, as Verizon.

mandated by the new services test, were prohibited by Illinois law, and should therefore not issue.[15]

On July 30, 2004, the Illinois Public Telecommunications Association[16] filed its Petition for Declaratory Ruling. IPTA seeks a declaratory ruling that its members are entitled to "refunds or reparations from SBC … [and] Verizon in the amounts [SBC and] Verizon charged said IPTA members from April 15, 1997 through [December 13, 2003 and] January 31, 2002 [respectively] for network services to the extent that the rates and charges were in excess of the cost-based rates of [sic] the Commission's new services test[.]" IPTA Petition at 3. The Commission should deny this relief in its entirety, for the reasons stated herein.

III. DISCUSSION

A. There is No Matter in Legal Controversy as the ICC Properly Applied State Law to the Intrastate Tariffs

IPTA asserts that the Commission's *Payphone Clarification Order*[17] required ILECs to have in effect rates for payphone services that fully complied with the new

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15 2003 Payphone Order at 44-47.

16 The Illinois Public Telecommunications Association is hereafter referred to as IPTA.

17 *Order*, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, DA 97-805 (April 15, 1997) (hereafter "Payphone Clarification Order").

services test on April 15, 1995 and at all times thereafter. IPTA Petition at 8, 14. This assertion is correct. However, IPTA next asserts that, to the extent that an ILEC's rates are subsequently found not to be in compliance with the new services test, refunds are owed to PSPs. IPTA Petition at 12-13. This assertion is simply incorrect, as a matter of Illinois law.

In its *Payphone Clarification Order*, this Commission made clear that the tariffs that it required ILECs to file in compliance with the new services test were *intra*state tariffs.[18] Further, as the Commission noted:

> [F]or purposes of meeting all of the requirements necessary to receive payphone compensation, the question of whether a LEC has effective intrastate tariffs in effect is to be considered on a state-by-state basis.[19]

It follows that intrastate tariffs are subject to state laws governing the filing and application of tariffs, especially since, under the Communications Act of 1934, this Commission has jurisdiction over "interstate or foreign communication by wire or radio[.]"[20] Accordingly, Illinois law governs the tariff issues IPTA raises in its Petition. This is fatal to IPTA's position.

The Illinois Public Utilities Act provides that:

> Except as in this Act otherwise provided, **no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product, or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates or other charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time, except as provided in Section 9-104** [requiring that tariffs be filed], nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates or other charges so specified, nor extend to any corporation or person any form of contract or

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18 *See, e.g.,* Payphone Clarification Order, ¶¶1, 2, 6, 8, 9, 10, 11, 12 (references to intrastate nature of tariffs).

19 Id., ¶12.

20 47 U.S.C. §152(a).

> agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons.[21]

Likewise:

> No public utility, or any officer or agent thereof, or any person acting for or employed by it, shall directly or indirectly, by any device or means whatsoever, suffer or permit any corporation or person to obtain any service, commodity, or product at less than the rate or other charge then established and in force as shown by the schedules filed and in effect at the time. No person or corporation shall, directly or indirectly, by any device or means whatsoever, whether with or without the consent or connivance of a public utility or any of its officers, or employees, seek to obtain or obtain any service, commodity, or product at less than the rate or other charge then established and in force therefor.[22]

These provisions are fully applicable to both SBC and Verizon.[23] Accordingly, it is clear that the filed rate doctrine, as codified in Sections 9-240 and 9-243 of the Illinois Public Utilities Act, governs the rates and tariffs at issue in this proceeding.

It is undisputed that both SBC and Verizon had intrastate tariffs in effect at the time IPTA members took service. The ICC approved SBC's tariffs in its *1995 Payphone Order*[24] -- indeed, the IPTA and SBC jointly settled the matter by a stipulated agreement, subject to approval by the ICC, which granted such approval in the *Order*.[25] The agreed-upon rates set forth in the ICC-approved tariffs were significantly discounted.[26] Accordingly, SBC had ICC-approved rates in effect at all times relevant to this

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21 220 ILCS 5/9-240 (emphasis added).

22 220 ILCS 5/9-243.

23 220 ILCS 5/13-101.

24 *Order*, Independent Coin Payphone Association and Total Communication Services, Inc. -vs- Illinois Bell Telephone Company: Complaint to reclassify Illinois Bell Telephone Company pay telephone services as a competitive service in Illinois Market, ICC Docket No. 88-0412, 1995 Ill. PUC Lexis© 393 (June 7, 1995) (hereafter "1995 Payphone Order").

25 1995 Payphone Order at 5-6, 52-54 (Lexis© pagination).

26 Id. at 35-43.

controversy. IPTA's assertion that these rates were somehow not the "lawful" rates is therefore entirely without merit.

The Illinois Supreme Court has spoken to the application of intrastate tariffs in circumstances similar to this one. In Independent Voters of Illinois v. Commerce Comm'n,[27] the Supreme Court determined that the ICC had improperly permitted the Illinois Bell Telephone Company to collect certain expenses in its rates.[28] During the pendency of the appeal of the ICC order authorizing recovery of these expenses, Illinois Bell charged the ICC-authorized rate. Id. The Court found this to be perfectly lawful and in accord with the Public Utilities Act, stating that:

> [I]t would contradict the statute for this court to conclude that a[n ICC]-approved rate order, which is later reversed by a reviewing court, is excessive [as a matter of law].[29]

Accordingly, the court declined to order restitution for the period during which the ICC-approved rates were lawfully in effect.[30]

Other portions of the Illinois Public Utilities Act confirm this conclusion. While the Act authorizes refunds, it does so where a "customer pays a bill as submitted by a public utility and the billing is later found to be incorrect **due to an error either in charging more than the published rate or in measuring the quantity or volume of**

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[27] Independent Voters of Illinois v. Commerce Comm'n, 117 Ill. 2d 90; 510 N.E.2d 850; 109 Ill. Dec. 782; 1987 Ill. Lexis© 199 (1987) (hereafter "IVI v. ICC").

[28] IVI v. ICC at 93; 510 N.E.2d at 852; 1987 Ill. Lexis© 199 at 2.

[29] Id. at 97; 510 N.E.2d at 854; 1987 Ill. Lexis© 199 at 9.

[30] Id. The IVI v. ICC Court did order the issuance of refunds in this proceeding, but in an entirely different context. Specifically, Illinois Bell continued to charge the higher rate after the reviewing court had determined it to be unlawful. IVI v. ICC at 93-94, 102; 510 N.E.2d at 852-53, 856-57; 1987 Ill. Lexis© 199 at 9, 16-18. The rate at that point was clearly unlawful, and so Illinois Bell's collection of it constituted an overcharge. Id. at 102; 510 N.E.2d at 856-57; 1987 Ill. Lexis© 199 at 16-18.

service provided[.]"[31] In other words, the ICC has the authority to order issuance of a refund where (a) the customer has been charged more than the tariffed rate; or (b) where the utility has charged for more units of service than the customer used. Neither case is applicable here; IPTA does not contend that SBC has charged anything other than the properly tariffed rate to PSPs at all times, and there is no question of mis-measurement. Accordingly, IPTA's claim must fail.

Here, the ICC specifically approved SBC's rates. The ICC's order approving the rates in question was based upon a stipulation between the parties, but, in light of the fact that IPTA was a party to the stipulation, and its members enjoyed lower rates than required by law, it cannot be heard to argue that this somehow prejudiced it. IPTA's refund request should be rejected with respect to SBC.

Verizon, like SBC, had rates in effect. The ICC, however, "approved" these rates not by any affirmative decision, but rather by declining to suspend Verizon's tariffs during the statutory period in which it is authorized to do so.[32] Nonetheless, IPTA's assertion that Verizon ought to be required to pay refunds should be rejected.

Verizon is not, in Illinois, at least, a Regional Bell Operating Company ("RBOC"), inasmuch as it is the corporate successor in its Illinois service territory to GTE North and GTE South.[33] This is a significant distinction because, as this

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31 220 ILCS 5/9-252.1 (emphasis added).

32 Under Section 9-201(a) of the Illinois Public Utilities Act, a tariff goes into effect on 45 days' notice, unless the ICC suspends it during that period. 220 ILCS 5/9-201(a). As both SBC's and Verizon's payphone rates are now competitive under Illinois law, and therefore subject to filing on one day's notice, and not subject to suspension, *see* 220 ILCS 5/13-502; 13-502.5, this matter is of markedly less importance.

33 *See* 47 U.S.C. §153(4) (Bell Operating Companies enumerated; GTE North and South not included).

Commission found in its *Wisconsin PSC Order*,[34] the portions of Section 276 requiring cost-based payphone rates apply only to RBOCs.[35] In so finding, the Commission stated as follows:

> It is important to note that we require only BOCs, and not LECs generally, to provide payphone lines at cost-based rates. Because sections 276(a) and (b)(1)(C) apply only to BOCs, we do not find that Congress has expressed with the requisite clarity its intention that the Commission exercise jurisdiction over the intrastate payphone prices of non-BOC LECs. Since there are statutory provisions that empower us to apply the new services test to payphone line rates and grant us that authority only over BOCs, we do not have a Congressional grant of jurisdiction over non-BOC LEC line rates.[36]

Accordingly, there never has been an affirmative federal obligation for Verizon to provide payphone services at cost-based rates.

Recognizing the limitations upon its jurisdiction under Section 276, the Commission "encourage[d] states to apply the new services test to all LECs, thereby extending the pro-competitive regime intended by Congress to apply to the BOCs to other LECs that occupy a similarly dominant position in the provision of payphone lines."[37] In accordance with this recommendation, the ICC determined that Verizon ought to be subject to the new services test, ruling as follows:

> The [ICC] finds, believes however, that it is still appropriate, as a matter of policy, to apply the NST to Verizon in Illinois. In the interest of consistency and uniform regulation, the [ICC] finds that it is appropriate to require Verizon to comply with the NST as it has been articulated in the FCC decisions discussed above. The FCC has encouraged state commissions to apply the NST services test [sic] to all LECs. Verizon is the dominant provider in its area.[38]

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34 *Order*, In the Matter of Wisconsin Public Service Commission: Order Directing Filings, FCC No. 02-25; CPD 00-01 (January 31, 2002) (hereafter "Wisconsin PSC Order").

35 Wisconsin PSC Order, ¶42.

36 Id.

37 Id.

38 2003 Payphone Order at 21.

It is clear, therefore, that Verizon's obligation to offer payphone service at cost-based rates could not have commenced on April 15, 1997, since, as the Commission recognized in its *Wisconsin PSC Order*, Verizon has never been properly subject to certain Section 276 requirements *as a federal matter*, and therefore this Commission's several payphone Orders, have never applied to it. While the ICC found it proper to apply the new services test to Verizon, it did so in its 2003 Payphone Order, entered November 12, 2003,[39] and Verizon was therefore not subject to the new services test before that date.[40] Thus, IPTA's attempts to obtain refunds by asserting that Verizon breached its obligation, commencing on April 15, 1997, to offer payphone services at cost based rates must fail, since Verizon's duty to do so actually commenced on the effective date of the ICC's 2003 Payphone Order, that being November 12, 2003.

Thus, the rates in effect at the time IPTA members took service were the lawful rates. IPTA members are not entitled to "refunds or reparations".

IPTA attempts to obfuscate the matter by contending that there is some distinction between "legal" rates and "lawful" rates. IPTA Petition at 12-13. It contends that the "legal" rate – the tariffed rate – can, under some circumstances, be different from the "lawful" rate. Id. "Lawfulness", the IPTA asserts, is a state of grace that attaches only to a rate affirmatively approved by the Commission, the ICC, or some other appropriate regulator. Id. It relies, inexplicably, upon Maislin Industries, U.S., Inc., et al. v. Primary

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39 Id. at 47.

40 In its 2003 Payphone Order, the ICC found that "[ICC] Cost of Service Rules require that ILECs must demonstrate compliance with LRSIC, an analysis that for [ICC] purposes is identical to the NST." 2003 Payphone Order at 21. However, this cannot be said to aid IPTA's federal argument.

Steel, Inc., et al.[41] in support of the proposition that "[t]he Act [gave] … the Commission the power … of determining the reasonableness of the published rate. If the finding on this question was against the carrier, reparation was to be awarded." IPTA Petition at 13, citing Maislin.

Maislin does not avail IPTA in the least. First, as demonstrated above, the rates in question here are *intra*state rates, governed by Illinois law, and the law governing filed rates in Illinois is quite clear, and is absolutely contrary to IPTA's position. Even were this not the case, IPTA cannot argue that SBC's rates, in particular, are not ICC-approved, Since, as noted above, the ICC did indeed specifically approve the rates, and *especially in light of the fact that IPTA was a party to a stipulation establishing such rates*. It loses this argument, both on the "legal" and "lawful" rates.

Further, Maislin scarcely supports IPTA's argument. In *citing* Maislin, IPTA neglects to point out several highly salient facts about the case. IPTA fails to make clear that the "Act" referred to in its citation to Maislin is the *Interstate Commerce Act*, and the "Commission" is the *Interstate Commerce Commission*, and the case itself is one entirely related to motor carriers.[42] It is therefore apparent that Maislin has little to do with Illinois intrastate telecommunications tariffs. Indeed, Maislin has little to do with this Commission's statutory authority under the Telecommunications Act of 1934.[43] Section

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[41] Maislin Industries, U.S., Inc., et al. v. Primary Steel, Inc., et al., 497 U.S. 116; 110 S. Ct. 2759; 111 L. Ed. 2d 94; 1990 U.S. LEXIS 3291; 58 U.S.L.W. 4862 (1990).

[42] Maislin, 497 U.S. at 119; 110 S. Ct. 2762; 111 L. Ed. 2d 103.

[43] It is, however, undoubtedly true that the purposes of the Interstate Commerce Act and Communications Act are undoubtedly similar. *See* AT&T v. Central Office Telecom., 524 U.S. 214; 118 S. Ct. 195; 141 L.Ed.2d 222 (1998) (goals of the two acts substantially the same).

203 of that Act provides that interstate tariffs go into effect on 120 days' notice.[44] The same section further provides – precisely as does Illinois law – that "no carrier shall (1) charge, demand, collect or receive a greater or less or different compensation, for [providing communications services] … than the charges specified in the schedule then in effect[.]"[45] Rebates and refunds are likewise prohibited.[46] There is no mention whatever of a requirement that the filed rates are subject to *post hoc* Commission approval, as IPTA contends. It is clear, therefore, that, under the Communications Act, the filed rate is the legal rate, the lawful rate, and the effective rate, regardless of IPTA's choice of adjectives.

In support of its Petition, IPTA points to several states that have ordered refunds from the effective date of the *Payphone Clarification Order*. IPTA Petition at 15. It notes, correctly, that other states have elected not to order refunds. Id. at 16. It states, "all PSPs' rights originate from the same federal Act as interpreted and implemented by the Commission. Yet there are seriously inconsistent implementations of these identical rights from state to state." Id. at 16-17. IPTA considers this to be "a significant outstanding legal controversy." Id. at 16.

This is not an accurate assessment of the state of legal affairs. While there is no doubt that states have reached differing resolutions of the refunds question, this is scarcely surprising. As this Commission recognized in its several Orders relating to payphone rates, the tariffs under which PSPs take service are intrastate. Accordingly, such tariffs are subject to state laws governing the filing, implementation, review and

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44 47 U.S.C. §203(b)(1).
45 47 U.S.C. §203(c)(1).
46 47 U.S.C. §203(c)(2).

application of tariffs. These laws are, unsurprisingly, not identical or even similar from state to state. Where some states' laws might allow refunds, other states – such as Illinois – have enacted laws that do not. This does not signify that states are engaging in "seriously inconsistent implementations"; instead it is a sign that state Commissions are resolving the question of refunds under intrastate tariffs by applying their respective state laws. There is, accordingly, no "significant outstanding legal controversy". State Commissions are complying with this Commission's Orders and state laws, which ought to come as a surprise to no one.

B. Equities Weigh Against Retroactive Refunds

In addition to the Petition's legal infirmity, the equities militate against adoption of IPTA's position, for several reasons. First, as noted above, the ICC, in its *1995 Payphone Order*, directed SBC – pursuant to an agreement between IPTA and SBC – to offer network services to IPTA members at rates below those required by law. IPTA members took service at those rates for nearly two years. It is therefore inequitable to demand retroactive refunds based upon a subsequent Commission order, especially where such refunds would violate Illinois law.

Second, it should be remembered that no one, including the ICC, was certain how to apply the new services test in the spring of 1997. The Common Carrier Bureau implicitly conceded as much when it granted the waiver the ILECs requested in the *Payphone Clarification Order*. Similarly, the Commission did not decide upon what it considered an adequate methodology for determining a just and reasonable overhead allocation – a vital component of the new services test -- until the January of 2002

issuance of its *Wisconsin PSC Order*,[47] nearly five years after the *Payphone Clarification Order*. In other words, an ILEC could file intrastate rates based upon its reasonable, good faith interpretation of Section 276 and the *Payphone Reclassification Order*,[48] which did not comply with direction given by the FCC five years later. Under IPTA's theory, such a carrier would, notwithstanding its and everyone else's confusion regarding the proper interpretation of Section 276, be liable for five years of refunds – an unjust, unreasonable and inequitable result, especially in light of the Common Carrier Bureau's specific finding that "while the individual BOCs may not be in full compliance with the intrastate tariffing requirements of the Payphone Reclassification Proceeding, **they have made a good faith effort to comply with the requirements**."[49]

Third, and related, there is no evidence that the tariffs SBC filed on May 19, 1997, or those Verizon filed on May 21, 1997, were filed in, or in any way characterized by, bad faith. While the ICC rejected both Verizon's and SBC's arguments regarding the proper methodology for determining overhead allocation, as well as Verizon's imputation arguments, none of these arguments were frivolous or advanced in bad faith. SBC and Verizon presumably believed that these arguments were correct, or at least had a reasonable chance of succeeding. Parties ought not to be punished for raising good faith arguments, which is precisely what IPTA's refund proposal would do.

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47 *Order*, In the Matter of Wisconsin Public Service Commission: Order Directing Filings, FCC No. 02-25; CPD 00-01 (January 31, 2002) (hereafter "Wisconsin PSC Order").

48 *Order On Reconsideration*, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 / Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, FCC Docket Nos. 96-128, 91-35, and 96-439 (November 8, 1996) (hereafter, "Order on Reconsideration").

49 Payphone Clarification Order, ¶14 (emphasis added).

Fourth, to the extent that IPTA members suffer any hardship as the result of alleged overpayments over an extended period, this is largely attributable to IPTA itself, inasmuch as IPTA did not pursue its own petition before the ICC with any particular diligence.[50]

C. Self-Certification was Not at Issue before the State Commission and is Irrelevant Here

The IPTA makes much of the fact that both SBC and Verizon each self-certified its compliance with the new services test so as to receive dial-around compensation. IPTA Petition at 4-5, 7, 11-12. It asserts that SBC's and Verizon's self-certification created a requirement that each offer IPTA members cost-based, Section 276-compliant rates as of April 15, 1997. Id. It further asserts that the ICC failed to enforce this Commission's directive that ILECs were ineligible for dial-around compensation until such time as they offered PSPs cost-based, Section 276-compliant rates. Id. at 7.

IPTA raises this argument for the first time in its Petition. It did not request that the ICC make a determination on the issue of self-certification, or even suggest at any point during the pendency of the proceeding before the ICC that self-certification was an issue.[51] While this proceeding is not by any means an appeal of the ICC's *2003 Payphone Order*, and the IPTA cannot therefore have been deemed to waive the issue here,[52] the IPTA's failure to raise it effectively precludes its argument here that "the ICC [*2003*

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[50] *See* 2003 Payphone Order at 43, n.16 (IPTA filed its direct testimony nearly 6 months late).

[51] See *Order*, Illinois Public Telecommunications Association, an Illinois not for profit corporation: Petition to determine whether Illinois local exchange carriers are in compliance with the Illinois Public Utilities Act and Section 276 of The Communications Act of 1934, ICC Docket No. 97-0225, 1997 Ill. PUC LEXIS 882 (December 17, 1997)(IPTA seeks no such relief in its initial Petition before the ICC).

Payphone Order] failed to enforce … the Commission's requirements, i.e., … that SBC … and Verizon were not eligible for dial around compensation until in actual compliance with the cost-based rate requirement[.]" IPTA Petition at 7. The ICC did precisely what this Commission directed it to do in the *Order on Reconsideration*[53]: implement, and direct ILECs to tariff, cost-based, Section 276-compliant intrastate payphone rates. The Commission did not require, nor did the IPTA request, that the ICC consider the issue of self-certification.

IPTA contends that the Common Carrier Bureau's *Bell Atlantic-Delaware Order*[54] supports the proposition that "[t]he determination of whether a carrier was in actual compliance [with the dial-around compensation certification requirement] rested with the state regulatory commission." IPTA Petition at 7. This is disingenuous. In the *Bell Atlantic-Delaware Order*, the Common Carrier Bureau found that:

> In the instant matter, neither Frontier nor MCI have availed themselves of this remedy, but instead have undertaken the remedy of self-help by refusing to pay compensation mandated by our rules. As we have stated in other contexts, such self-help remedies are strongly disfavored by the Commission. [fn] We emphasize that a LEC's certification letter does not substitute for the LEC's obligation to comply with the requirements as set forth in the *Payphone Orders.* The Commission consistently has stated that LECs must satisfy the requirements set forth in the *Payphone Orders*, subject to waivers subsequently granted, to be eligible to receive compensation. **Determination of the LEC's compliance, however, is a function solely within the Commission's and state's jurisdiction. As stated above, the Commission specifically delegated to the Common Carrier Bureau the authority to determine whether a LEC has complied with the compensation eligibility prerequisites.**[55]

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[52] The ICC reserves the right to argue in other *fora* that IPTA has waived this argument.

[53] Order on Reconsideration, ¶163.

[54] *Memorandum Opinion and Order*, In the Matters of: Bell Atlantic-Delaware, et al. v. Frontier Communications Services, Inc., et al. / Bell Atlantic-Delaware, et al. v. MCI Telecommunications Corporation, DA No. 99-1971, File Nos. E-98-48, E-98-49 (September 24, 1999)(hereafter "Bell Atlantic-Delaware Order").

[55] Bell Atlantic-Delaware Order, ¶28.

In fact, the Common Carrier Bureau's holding was not that a state Commission had, as IPTA suggests, some affirmative duty to investigate each ILEC's certification and determine whether it was in compliance with each required certification criteria. Indeed, the Common Carrier Bureau found that:

> [T]he term "certification" as set forth in the *Order on Reconsideration* does not require a LEC to demonstrate to the satisfaction of the IXC payor that such LEC has satisfied each compensation eligibility prerequisite. Rather, we find that the term "certification" as set forth in the *Order on Reconsideration* requires that a LEC be able to attest authoritatively that such LEC indeed has complied with each prerequisite. Therefore, we conclude that Bell Atlantic's letters to Defendants, which attested that Bell Atlantic had complied with each prerequisite, constitute a valid certification such that Defendants were obligated to pay Bell Atlantic payphone compensation.[56]

In other words, when the Common Carrier Bureau observed that "[d]etermination of the LEC's compliance, however, is a function solely within the Commission's and state's jurisdiction[,]"[57] it did so in support of its finding that PSPs were not permitted to engage in self-help by refusing to pay dial-around compensation to ILECs, but rather were required to accept the ILECs' certified representation of compliance, which the Commission and state Commissions – rather than PSPs – had the authority investigate where warranted.[58] It is clear, therefore, that IPTA's contention that "[t]he determination of whether a carrier was in actual compliance [with the dial-around compensation certification requirement] rested with the state regulatory commission[,]" significantly misstates the law. State Commissions and this Commission *both* have jurisdiction to review the propriety of ILEC dial-around certifications, and are certainly not required to without some clear basis (e.g., a complaint or Petition) for doing so. In any case, IPTA,

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56 Id., ¶14.

57 Id., ¶28.

having never requested that the ICC undertake such an investigation, cannot be heard to complain that none has been undertaken.

Moreover, the question of self-certification is irrelevant to the question of refunds. Self-certification is the method whereby an ILEC certifies its compliance with Section 276 criteria in order to obtain *dial-around compensation*.[59] It has nothing whatever to do with refunds for alleged overpayments for network services. If IPTA should ultimately demonstrate that either Verizon or SBC have improperly self-certified eligibility for dial-around compensation – and this is a showing that IPTA has not made, and indeed is alleging here for the first time – then the proper remedy is not to require refunds, in contravention of Illinois law, of portions of the entirely lawful rates charged to IPTA members, but instead to require Verizon or SBC to disgorge dial-around compensation obtained as a result of improper self-certification.

IV. CONCLUSION

In conclusion, IPTA's Petition should be denied in its entirety. IPTA seeks remedies that are in clear violation of Illinois law and which the equities do not warrant. WHEREAS, for the reasons set forth above, the Illinois Commerce Commission hereby requests that the Commission consider these comments in opposition to the IPTA petition for declaratory ruling and deny the petition. In the alternative, if the Commission should decide to make a declaratory ruling, the ICC requests that the Commission clarify that state law governs the intrastate tariffs at issue here, that the equities prohibit retroactive refunds, and that the issue of self-certification is irrelevant.

Respectfully submitted,

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[58] Id., ¶¶19-20, 28.

/s/ Christine F. Ericson

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[59] Id., ¶15.